Supreme Court, U.S.
FILED

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No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

FIRST VIRGINIA BANK,

Petitioner,

v.

UNITED STATES OF AMERICA AND
U.S. DEPARTMENT OF STATE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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73 pp

QUESTION PRESENTED

When Congress subjects the United States to state courts' writs, can the United States be held responsible for disobedience of the writ in a situation where a private citizen would be responsible?

LIST OF PARTIES

First Virginia Bank was the original plaintiff in this matter and was the appellee before the Court of Appeals. First Virginia Bank is a wholly-owned subsidiary of First Virginia Banks, Inc. First Virginia Bank has no subsidiaries which are not wholly-owned.

Vera Randolph was the original defendant in this matter. She has not participated in this matter since it was before the District Court. Therefore, First Virginia Bank believes she has no interest in the outcome of these proceedings.

The United States, through the Department of State, was Ms. Randolph's employer and became a participant in this matter as a garnishee after First Virginia Bank obtained a judgment against Ms. Randolph. It was the appellant before the Court of Appeals.

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First Virginia Bank respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 110 F.3d 75 and is reproduced in the appendix hereto ("App.") at 1a. The decision of the District Court in this case is reported at 920 F. Supp. 213 and is reproduced in the Appendix at 13a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on April 11, 1997. Petitioner First Virginia Bank filed a timely Suggestion for Rehearing *In Banc* and Petition for Rehearing, which was denied on June 12, 1997. App. 27a-28a. This petition is thus timely pursuant to this Court's Rule 13(3), and this Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The text of the pertinent statutes and regulations are reproduced in the Appendix at 29a-33a.

STATEMENT OF THE CASE

Petitioner First Virginia Bank ("First Virginia") was a creditor of Ms. Vera Randolph, an employee of the United States Department of State. In 1982, First Virginia obtained a judgment against Ms. Randolph in the Superior Court of the District of Columbia, but was to a large degree

unsuccessful in attempts to collect that judgment. At that time, First Virginia could not garnish Ms. Randolph's wages because no authority existed for garnishment actions involving federal employees.

As part of the Hatch Act Reform Amendments of 1993, Congress enacted 5 U.S.C. § 5520a, which for the first time allowed garnishment of federal employees' wages. In 1994, First Virginia revived its judgment against Ms. Randolph. A Writ of Attachment on a Judgment (Garnishment of Wages, Earnings, Salary, Commissions and Pensions) was issued by the Superior Court of the District of Columbia and served on the government on February 14, 1994. However, the government did not begin withholding from Ms. Randolph's pay until March 31, 1994.

By August 17, 1994, Ms. Randolph had learned that she was eligible for an early retirement program, considered and applied for that program, and had her application approved. Her last day of work was November 23, 1994, but she was not deemed retired until December 30 of that year. However, on November 21, 1994, Ms. Randolph moved to quash the writ of garnishment and notified the government of her motion. Without waiting for the court to rule on Ms. Randolph's motion, the government stopped garnishing her wages. It is undisputed that the government was wrong in doing so.

On January 19, 1995, Ms. Randolph received a final paycheck in the amount of $17,563.50--several times the balance due First Virginia at the time. Shortly thereafter, when First Virginia informed the government of its error in ceasing withholding, the government replied that it owed no more pay to Ms. Randolph and thus had nothing left to withhold for payment to First Virginia.

On April 28, 1995, First Virginia filed a Motion for Judgment of Recovery against the government. This motion was filed in the already-pending action in the Superior Court of the District of Columbia, the same action in which the writ of garnishment had issued. The government responded on May 15, 1995, by removing the case to the United States District Court for the District of Columbia under 28 U.S.C. § 1442(a)(1). As the Court of Appeals subsequently determined, *see* App. at 7a, because First Virginia's claim against the government arose under 5 U.S.C. § 5520a, the District Court also had jurisdiction pursuant to 28 U.S.C. § 1331.

After cross-motions for summary judgment, the District Court granted summary judgment to First Virginia on March 29, 1996. The District Court determined that the government had wrongfully ceased garnishing Ms. Randolph's pay, App. 17a-20a, and that therefore, pursuant to D.C. Code Ann. § 16-575 (1989), the government was liable to First Virginia. App. 20a-21a. The District Court also rejected the government's sovereign immunity defense, relying on § 5520a's mandate that federal employers be treated "as if the agency were a private person" and the unquestionable liability of a private employer under the same circumstances. App. 22a-23a. The District Court also relied on similar results obtained under 42 U.S.C. § 659--the statute which was the paradigm for § 5520a. App. 23a-25a.

The Court of Appeals reversed the District Court. After considering its jurisdiction, the Court of Appeals interpreted § 5520a to reach nothing more than the "pay" of federal employees. App. 8a. The Court of Appeals reasoned that only this pay was subject to "legal process," and only if the process was "in the nature of a garnishment." It then held that First Virginia's Motion for Judgment of Recovery

Against Garnishee was new and different legal process which was not a part of the original garnishment, and thus unauthorized under § 5520a. App. 8a-9a. The Court of Appeals also viewed its opinion as consistent with a decision of the Eleventh Circuit interpreting § 659. App. 10a-11a.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals conflicts with pertinent precedent of this Court and that of another federal circuit court of appeals. In the process, the Court of Appeals relied on a faulty premise in creating a novel interpretation of federal law that conflicts with established principles and precedent of this Court. It also decided an important question of federal law in a manner that could have dire consequences for the collection of child support payments.

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH DIRECTLY APPLICABLE PRECEDENT.

While the decision of the Court of Appeals is the only known interpretation of 5 U.S.C. § 5520a, that section is not a novel statute. Rather, § 5520a is expressly modeled on 42 U.S.C. § 659, which provides for garnishment of federal employees' pay for child support obligations. Even the language of these two statutes is nearly identical, as are their implementing regulations. Decisions under § 659 therefore apply to § 5520a.

Section 659 was construed in *United States v. Morton,* 467 U.S. 822 (1984). There, this Court said,

> The legislative history, as well as the plain language of § 659(a), indicates that Congress intended the

> Government to receive the same treatment as a private employer with respect to garnishment orders.

Id. at 831. The Court went on to say that "to adopt a different standard for liability than would be applicable to a private employer . . . . is foreclosed by the statute and its legislative history." *Id.* at 833.

However, in the present case, the Court of Appeals has *expressly* adopted a different standard for the government. Had a private employer erroneously failed to withhold part of an employee's wages, as it is conceded the government did here, it would clearly be liable. Therefore, the Court of Appeals' decision in this matter directly contradicts *Morton*.

The Court of Appeals' opinion is also at odds with the Eleventh Circuit's interpretation of § 659 in *Loftin v. Rush*, 767 F.2d 800 (11th Cir. 1985). While the Court of Appeals expressly deemed its opinion as harmonious with *Loftin*, it is not. *Loftin* limited judgments against the United States for errors in handling garnishments, but that limitation applied only to "any amount *in excess* of that owed [by the government] to the judgment debtor/employee at the time of the garnishment." *Id.* at 808 (emphasis added). The District Court's judgment in the instant matter was well within this parameter. Further, the result in *Loftin* was inconsistent with the decision of the Court of Appeals, because in *Loftin* the Eleventh Circuit held the government liable for amounts it should have, but did not, withhold. *Id.* at 810.[1]

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[1]There are five cases decided by lower federal tribunals which found the government responsible for its failure to withhold under § 659. *DeTienne v. DeTienne*, 815 F. Supp. 394 (D. Kan. 1993); *Young v. Young*, 547 F. Supp. 1 (W.D. Tenn. 1980); *In re Mathews*, 61 Comp. Gen. 229 (1982); *In re Bailey*, 56 Comp. Gen. 593 (1977); *In re*

In reaching its conclusion in *Loftin*, the Eleventh Circuit expressly deferred to regulations implementing § 659(a). *Id.* at 807, n.12. Those regulations make the government liable for amounts it mistakenly fails to withhold from the pay of the federal employee. 5 C.F.R. § 581.305(e) (1996). An identical provision appears in the regulations for § 5520a. 5 C.F.R. § 582.305(g) (1996). However, in the instant matter the Court of Appeals ignored this corresponding regulation.

By misconstruing *Loftin* and ignoring the other precedent under § 659, the Court of Appeals violated this Court's precedents governing statutory construction. The principles announced by this Court dictate that § 5520a should have the same meaning as § 659. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). Similarly, all known interpretations of § 659 predate passage of § 5520a. "[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have knowledge of the interpretation given to the incorporated law . . . ." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). The passage of § 5520a ratified the interpretations given § 659 and made them part of § 5520a, and so the Court of Appeals' decision is in error.

II. THE COURT OF APPEALS MISCONSTRUED A FUNDAMENTAL STATUTORY TERM AND LEGAL CONCEPT.

The linchpin of the Court of Appeals' decision is its characterization of First Virginia's Motion for Judgment of Recovery Against Garnishee as a separate "damage action." The opinion states that this request for relief was "not 'in the

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Washington, 55 Comp. Gen. 517 (1975). This comprises most of the authority on this issue.

nature of a garnishment'" and thus not "legal process," as defined in § 5520a. App. 9a. However, that opinion also twice recognizes that First Virginia's request for relief against the government was by motion. App. 3a, 8a. A motion is not process, and so the Court of Appeals' decision rests on a faulty premise.

The Court of Appeals' premise is contrary to both the plain language of the statute and essential legal concepts. 5 U.S.C. § 5520a(a)(3)(A) defines "legal process" as a "writ, order, summons, or similar process." "The word 'process,' however, as now commonly understood, refers to a summons, or, summons and complaint, and, less commonly, to a writ." *Black's Law Dictionary* 1205 (6th ed. 1990). The only "legal process" in this matter was the original writ of garnishment.

First Virginia's Motion for Judgment of Recovery Against Garnishee was merely ancillary to, and in aid of, the original writ. No new process had to be issued. The government was already before the court pursuant to the original writ. The motion was filed in the same case and had the same case number as the original writ. The decision to award First Virginia amounts which the government wrongfully failed to withhold from Ms. Randolph's pay was thus not a new or different proceeding.

In fact, the District Court's award against the government was contemplated in the original writ of garnishment. This original writ on its face warned the government: "NOTICE TO EMPLOYER-GARNISHEE: . . . judgment may be entered against you for the entire amount of the plaintiff's claims with interest and costs." Thus, the original writ contemplated recovery from the government for its actions pursuant to the writ. The District Court's judgment for First

Virginia was thus part of the very "legal process" to which the government was made subject by § 5520a.

III. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THIS COURT'S PRECEDENTS REGARDING OBEDIENCE OF COURT ORDERS.

The Court of Appeals' opinion also conflicts with this Court's precedent regarding the enforcement of judicial authority. Writs of garnishment are court orders. As this Court has said many times, it is axiomatic that all orders of courts must be complied with promptly, *see Maness v. Meyers*, 419 U.S. 449, 459 (1975), and that disobedience of a court order may be punished. "There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani v. United States*, 384 U.S. 364, 370 (1966). Like any other court order, a writ of garnishment may be enforced by the court that issued it.

The power to punish disobedience of court orders includes imposing fines to compensate an injured party for losses resulting from the disobedience. *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1947). "The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949). The District Court's judgment in the instant matter was consistent with these principles. First Virginia never sought, and was not awarded, any more than the balance on the debt owed it.

Further, the District Court's judgment did not involve a novel application of this judicial power. Numerous cases

have contemplated imposing a fine against the government while holding it in contempt. *Lander v. Morton*, 518 F.2d 1084, 1087 (D.C. Cir. 1975) (Department of the Interior); *Koyo Seiko Co., Ltd. v. United States*, 861 F. Supp. 79, 85 (Ct. Int'l Trade 1994) (Commerce Department) (subsequently modified, dismissed, and vacated in part, in numerous proceedings, but all on other grounds); *In re Tardiff*, 146 B.R. 499 (D. Maine 1992) (IRS); *In re Kiker*, 98 B.R. 103 (Bankr. N.D. Ga. 1988) (same); *Benford v. American Broadcasting Corp.*, 565 F. Supp. 139 (D. Md. 1983) (Clerk of the House of Representatives), *rev'd on other grounds sub nom. In re Guthrie*, 733 F.2d 634 (4th Cir. 1984); *cf. United States v. Norton*, 717 F.2d 767, 774 (3d Cir. 1983) (IRS); *Armstrong v. Executive Office of the President*, 821 F. Supp. 761 (D.D.C. 1993).

Thus, while the District Court's award to First Virginia was authorized by § 5520a, it was likewise consistent with the court's inherent ability to address the government's disregard of the mandate of the writ of garnishment. The government was made subject to such writs by § 5520a. The Court of Appeals' opinion therefore contravenes not only § 5520a, but also this Court's precedent regarding judicial authority and the vindication of that authority.

IV. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH PRINCIPLES OF GOVERNMENT ACCOUNTABILITY.

The Court of Appeals' opinion also conflicts with this Court's precedent regarding the accountability of the government when it fails to honor its obligations. Likewise, it is inconsistent with this Court's analysis of the effect of garnishment. These precedents coalesce in this case because § 5520a makes the government subject to garnishments "in

the same manner and to the same extent as if the agency were a private person."

A garnishment writ directs an employer to pay money to a third person, a judgment creditor. Here, the writ imposed an obligation on the government to make payments to First Virginia. "[I]f an agency has a legal obligation to pay money to a party, that duty does not disappear simply because the money was paid in error to the wrong person." *Aetna Casualty & Surety Co. v. United States*, 71 F.3d 475, 479 (2nd Cir. 1995). Where the government fails to fulfill its obligation to make monetary payments, the aggrieved party has a right of action against the government. *Bowen v. Massachusetts*, 487 U.S. 879 (1988). Such actions are not in the nature of a claim for monetary damages. *Id.* Therefore, the Court of Appeals erred both in characterizing First Virginia's Motion for Judgment of Recovery Against Garnishee as an action for damages and in revoking the relief the District Court had granted First Virginia.

As this Court held over 125 years ago, "Garnishment almost everywhere exists. . . . It arrests the property in hands of the garnishee . . .and, therefore, has the effect of a seizure." *Miller v. United States*, 78 U.S. 268, 297 (1871) (seizure can be had simply by serving writ; this places property in the court's jurisdiction). Garnishment is generally regarded as divesting the debtor of title to the garnished funds, and charging the garnishee with the preservation of those funds. *See In re Coppie*, 728 F.2d 951, 952-53 (7th Cir. 1984), *cert. denied*, 469 U.S. 1105 (1985); *In re Connor*, 733 F.2d 1560, 1562 (11th Cir. 1984). Thus, the Court of Appeals' decision effectively sanctions an unauthorized taking of private property by the government.

The liability of private employers for mishandling a

garnishment is a common feature of state garnishment schemes. In passing § 5520a, Congress made the government subject to these state garnishment schemes. Where Congress makes state law applicable to federal interests, liabilities under state law are equally applicable to the federal interests affected. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988). Therefore, the government should be held responsible here, and the Court of Appeals erred.

This conclusion is bolstered by both the language of § 5520a and its legislative history. The statute mandates that federal agencies be subject to garnishment writs "in the same manner and to the same extent as if the agency were a private person." 5 U.S.C. § 5520a(b). The legislative history of § 5520a is replete with pronouncements that the purpose of the statute is to subject federal employees to the same garnishment rules and processes as their counterparts in the private sector. *See, e.g.*, Senate Comm. on Gov't Affairs, S. Rep. No. 103-57, 103d Cong. 1st Sess. (1993), reprinted in 1993 U.S.C.C.A.N. 1802, 1807-10, 1843; *The Garnishment Equalization Act of 1991; Hearings on S.316 Before the Subcomm. on Fed. Serv., Post Office, and Civil Serv. of the Senate Comm. on Gov't Affairs*, 102d Cong. 3, 35, 37, 44, 54 (1992).

To assure the efficient and effective handling of garnishment writs, those writs hold private employers liable for failure to comply with the writs' terms. Section 5520a requires nothing less of federal employers.

V. THE COURT OF APPEALS' DECISION COULD HAVE DIRE CONSEQUENCES TO CHILDREN ENTITLED TO SUPPORT.

The similarity of § 659 and § 5520a suggests that the Court of Appeals' decision may be applied in cases arising under § 659. This will deprive children of needed support when the government mishandles a federal employee's child support garnishment. *See* App. at 48a. The effect will be great, even if no other circuit follows this precedent, because this decision is now law in the circuit which has the largest single concentration of federal employees of any circuit.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A
OPINION OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 24, 1997 Decided April 11, 1997

No. 96-5205

FIRST VIRGINIA BANK,)
)
Appellee;)
)
v.)
)
VERA RANDOLPH,)
)
Defendant;)
)
UNITED STATES OF AMERICA AND)
U.S. DEPARTMENT OF STATE;)
)
Appellants.)

Appeal from the United States District Court
for the District of Columbia
(95cv00919)

Robert D. Kamenshine, Attorney, U.S. Department of Justice, argued the cause for appellants. With him on the briefs were *Frank W. Hunger*, Assistant Attorney General,

and *William G. Kanter*, Deputy Director. *Eric H. Holder, Jr.*, U.S. attorney, *Claire M. Whitaker* and *R. Craig Lawrence*, Assistant U.S. Attorneys, entered appearances.

Mark L. Booz argued the cause and filed the briefs for appellee First Virginia Bank. *Kathleen T. Barlow* entered an appearance.

Before: WILLIAMS, HENDERSON, and RANDOLPH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* RANDOLPH.

RANDOLPH, *Circuit Judge*: May a judgment creditor recover damages against the United States for its wrongful failure to garnish the wages of a government employee who is a judgment debtor? That issue, and a jurisdictional question, are presented in the government's appeal from the district court's award of $385.71 in "damages" to First Virginia Bank.

I

The State Department began garnishing the wages of its employee, Vera Randolph, in March 1994 after it was served with a writ of attachment. The Bank obtained the writ from the Superior Court of the District of Columbia. The garnishment provision of the Hatch Act Reform Amendments of 1993, 5 U.S. C. § 5520a(b), subjects the pay of federal agency employees to legal process "in the same manner and to the same extent as if the agency were a private person." District of Columbia law requires an employer served with a writ of attachment to "withhold and pay" to the judgment creditor a percentage of the employee's gross wages until the

"attachment is wholly satisfied." D.C. Code § 16-573(a) & (a)(2).

In November 1994, nine months after the garnishment began, Randolph notified the State Department of her filing of a motion in Superior Court to quash the writ. The State Department then stopped garnishing her wages in light of D.C. Code § 16-573(b). This local law states that whenever the employer receives "written notice of any court proceeding attacking the attachment or the judgment on which it is based, the employer shall make no further payments to the judgment creditor or his legal representative until receipt of an order terminating the proceedings; except that in the case of child support judgments, the employer shall continue to withhold the payments from the judgment debtor until receipt of an order of the court terminating the withholding."

Shortly after notifying the State Department of her motion, Randolph retired from federal service. The Superior Court thereafter declared her challenge to the writ of attachment moot because the State Department was no longer paying her any wages. First Virginia Bank--whose judgment against Randolph remained unsatisfied--filed a motion against the State Department to recover the portion of Randolph's wages the Bank would have received if the government had continued garnishing them, as the Bank claimed it should have. The government responded by removing the case to the federal district court.

On cross-motions for summary judgment, the district court ruled that the State Department had wrongfully ceased garnishing Randolph's pay. No matter that Randolph had filed a motion to quash the writ of attachment. As the district court saw it, the State Department had misinterpreted D.C. Code § 16-573(b). The garnishment should have

continued while Randolph litigated her motion. The court viewed § 16-573(b) as relieving employers only of their duty to pay the withheld wages to the judgment creditor, not to stop withholding a percentage of the employee's wages. *First Va. Bank v. Randolph*, 920 F. Supp. 213, 216-17 (D.D.C. 1996). (The government has decided not to contest this ruling.)

In seeking a monetary award against the State Department for its failure to withhold part of Randolph's wages, the Bank relied upon D.C. Code § 16-575: if "the employer-garnishee fails to pay to the judgment creditor the percentages ... of the wages which become payable to the judgment debtor for any pay period, judgment shall be entered against him for an amount equal to the percentages with respect to which the failure occurs." The government invoked sovereign immunity to shield it from liability under § 16-575, but the district court held that the Hatch Act amendment, by subjecting the federal government to the same legal responsibilities as private employers, waived the government's immunity. *First Va. Bank*, 920 F. Supp. at 218. Accordingly, the court awarded the Bank $385.71 in "damages," an amount representing $75.71 in the outstanding principal on Randolph's debts and $310.00 in costs.

II

Before argument, we ordered the parties to file supplemental briefs addressing the question whether this court or the Federal Circuit had jurisdiction over the appeal. The so-called little Tucker Act gives district courts and the Court of Federal Claims concurrent jurisdiction of any "civil action or claim against the United State, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department or

upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1346(a)(2). Under 28 U.S.C. § 1295(a)(2), the Federal Circuit has exclusive jurisdiction over appeals in non-tax cases in which the district court's jurisdiction "was based, in whole or in part" on the little Tucker Act.

The presence, or absence, of our appellate jurisdiction thus depends on what occurred in the district court. If the district court's jurisdiction did not rest in whole or in part on the little Tucker Act, we have jurisdiction over the government's appeal. Both parties think the appeal is properly before us, but for different reasons. The government's main point is that little Tucker Act jurisdiction could not have existed because the Bank failed to satisfy one of the conditions for invoking it--namely, that the substantive law, here the Hatch Act Reform Amendments, 5 U.S.C. § 5520a(b), "can fairly be interpreted" to mandate compensation from the government for the damage the Bank incurred. *United States v. Mitchell,* 463 U.S. 206, 217 (1983). To rule on the government's contention would draw us close to the merits and so we will pass over it for the moment. There are other reasons for sustaining our appellate jurisdiction.

Even if a substantive law mandates compensation from the government, a claimant will need to show that the United States has consented to the suit. this showing is considered a prerequisite to jurisdiction; if the government has not consented to the suit, sovereign immunity requires the court to dismiss the action for lack of jurisdiction. *United States v. Mitchell,* 463 U.S. at 212. Because sovereign immunity is thus "jurisdictional," the little Tucker Act can be viewed as conferring "jurisdiction" in two respects. The Act vests the

district courts with concurrent subject matter jurisdiction over specified claims against the government not exceeding $10,000. the Act also gives the district courts (and the claims court) "jurisdiction" by waiving the government's sovereign immunity. *Id.*

Litigants seeking damages from the United States for statutory violations often have no choice but to base their lawsuits on the little Tucker Act. If the substantive statutes on which they rest their damage claims to do not waive sovereign immunity (or do not consent to suit, which amounts to the same thing), plaintiffs have to use the waiver contained in the Tucker Act. but there are cases in the district courts--this one of them--in which the plaintiff decides not to rely on the little Tucker Act, cases in which the plaintiff rests on some other provision of federal law for the requisite governmental consent to suit. Such cases are not based, wholly or partly, on the little Tucker Act and appeals from the judgments of the district courts are to be heard in the regional courts of appeals, not the Federal Circuit. *See Vietnam Veterans of Am. v. Secretary of the Navy*, 843 F.2d 528, 533-34 (D.C. Cir. 1988). We once described this category of lawsuits as comprising claims "brought under statutes that independently confer jurisdiction upon the district court and waive sovereign immunity for money claims against the United States." *Van Drasek v. Lehman*, 762 F.2d 1065, 1068 (D.C. Cir. 1985).

The statement in *Van Drasek* does not mean that the waiver of sovereign immunity itself "independently confer[s] jurisdiction." Nor does it mean that the substantive provision the government allegedly violated must "independently confer jurisdiction." There may be a separate provision waiving sovereign immunity (and in that sense, conferring "jurisdiction"), but subject matter jurisdiction still must be

established. Here that was accomplished through 28 U.S.C. § 1331, the provision vesting the district courts with jurisdiction over cases arising under federal law. The Bank's action qualifies as such a case because it arises under the Hatch Act Reform Amendments. As to the other jurisdictional prerequisite--sovereign immunity--the Bank claimed, and the district court agreed, that the Hatch Act amendments waived the government's immunity. See *First Va. Bank*, 920 F. Supp. at 217-18. Both of the conditions mentioned in the statement from *Van Drasek* were therefore present: the district court had subject matter jurisdiction under 28 U.S.C. § 1331, and the claimant invoked only a provision other than the little Tucker Act for the waiver of sovereign immunity. The Bank's action in the district court was therefore not "based" on the little Tucker Act; indeed, at no point in the proceedings did the Bank even mention the little Tucker Act, *See Kidwell v. Department of the Army*, 56 F. 3d 279, 283 (D.C. Cir. 1995); *Western Securities Co. v. Derwinski*, 937 F.2d 1276, 1280-81 (7th Cir. 1991). As a result, appellate jurisdiction is in this court.

III

On the merits, there are two potential issues. The first is whether the Hatch Act amendments gave the Bank a cause of action against the government. The second is whether, if it did, the amendments waived the government's sovereign immunity from the sort of damage action the Bank brought here. As the Supreme Court discussed in *United States v. Mitchell*, these are analytically distinct questions. 463 U.S. at 218-19. If federal substantive law did not mandate compensation from the government for the Bank's damages, the question of sovereign immunity drops out of the case. See *United States v. Morton*, 467 U.S. 822 (1984).

In light of the government's failure to argue the point, we will assume the State Department should have continued withholding a percentage of Randolph's wages despite her motion to quash. D.C. Code § 16-575 renders private employers strictly liable when they wrongfully fail to pay a judgment creditor the percentage of an employee's wages subject to garnishment. *See Landahl, Brown & Weed, Assocs. v. Houston, 404 A.2d 934, 935 (D.C. 1979); Household Fin. Corp. v. Training Research & Dev., Inc.*, 316 A.2d 850, 852 (D.C. 1974). Still, it does not necessarily follow that federal law requires the government to compensate the Bank. That depends on the effect of 5 U.S.C. § 5520a(b). Does this language in § 5520a(b)--"pay from an agency to an employee is subject to legal process n the same manner and to the same extent as if the agency were a private person"--make the United States liable to a judgment creditor for wrongfully failing to garnish an employee's wages?

The first, and nearly decisive point, is that under § 5520a(b) it is only the employee's "pay" that is made "subject to legal process." The Bank's motion in the D.C. Superior Court was not for Randolph's pay, or any part of it. Once the employee leaves government service, as Randolph has, there is no longer any "pay from an agency to an employee" that can be subject to legal process. Any amount the Bank recovered would come not from the annual appropriation for State Department salaries and expenses (*see, e.g.,* Omnibus consolidated Appropriation Act, 1997, Pub. L. No. 104-208, § 101(a), 110 Stat. 3009 (1996) (fiscal year 1997)), but from the "general appropriation of funds" set aside for the purpose of satisfying judgments against the United States. *Office of Personnel Management v. Richmond,* 496 U.S. 414, 431 (1990); *see* 31 U.S.C. § 1304. In awarding $385.71 to the Bank, the district court was not

ordering the government to remit part of Randolph's pay. It was ordering the government to give other money to the Bank as damages. Nothing in § 5520a(b) speaks to that sort of recovery against the United States. True enough, § 5520a(b) subjects the employee's pay to the same legal process as if the employing agency were a private entity. but this cuts against the Bank, not in favor of it. The statute defines "legal process" to mean "any writ, order, summons, or similar process in the nature of a garnishment, that ... orders the employing agency of such employee to withhold an amount from the pay of such employee, and make a payment of such withholding to another person, for a specifically described satisfaction of a legal debt of the employee." 5 U.S.C. § 5520a(a)(3) & (a)(3)(B). The Bank's action against the government was not "in the nature of a garnishment," and it was not an action ordering the government "to withhold an amount from the pay" of an employee.[1] The Bank itself characterizes its claim as one

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[1] A regulation of the Office of Personnel Management states:

> Where an agency initially determines that legal process should not be honored, if it subsequently determines that its initial determination was erroneous, it may correct its initial determination and honor the legal process. If an agency corrects an error or is required to do so by a court or other authority, under no circumstances will the agency be required to pay more than if it had originally honored the legal process.

5 C.F.R. § 582.305(g). This does not change our reading of § 5520a(b). The regulation does not purport to set forth an interpretation of § 5520a(b) and it is, in any event ambiguous. It could mean that an agency may make up for the amount that it erred in not withholding by deducting further sums from the employee's pay. If that practice is followed,

sounding in tort, for wrongful conversion we suppose.[2] Supplemental Brief for Appellee First Virginia Bank at 2-4. In short, by subjecting the pay of federal employees to the legal process applicable to private employers, § 5520a(b) incorporates the D.C. law requiring employers to withhold a percentage of the employees' wages, but it does not subject the United States to damage actions by judgment creditors.

Our interpretation of § 5520a(b) is not inconsistent with the holding of *Loftin v. Rush*, 767 F.2d 800, 808-09 (11th Cir. 1985), on which the district court relied in awarding damages to the Bank. *Loftin* dealt with a different issue under a statute subjecting the pay of government employees to garnishment for unpaid child support and alimony. The commercial garnishment statute before us and the child support statute (42 U.S.C. § 659(a)) are similar. *Loftin* reached the court of appeals in the following posture. In February 1984, Pamela Loftin had a "summons of garnishment" from a Georgia court served on the United States Navy, her ex-husband's employer. The ex-husband had failed to pay the child support ordered in a 1974 divorce decree and, by 1984, owed Loftin nearly $38,000. *Loftin*,

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nothing in our opinion would warrant changing it. *See also infra* note 3.

[2] The Bank tells us that it would have an action against the United states under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), if negligence on the part of a government officer resulted in the failure to garnish the employee's wages. Supplemental Brief for Appellee First Virginia Bank at 2-4. The government also acknowledges that "judgment creditors might have a remedy under the Federal Tort Claims Act," Brief for Appellants at 14 n.8. We express no view on the question. There is no indication that the Bank exhausted administrative remedies before seeking recovery from the government. *See Simpkins v. District of Columbia Gov't*, No. 94-5243, slip op. at 8 (D.C. Cir. Mar. 14, 1997).

767 F.2d at 801. Under Georgia law, the Navy had 45 days to answer the summons. *Id.* After this period lapsed, Loftin obtained--again pursuant to Georgia law--a default judgment against the Navy for the full amount due to her from her ex-husband, that is, $38,000. *Id.* In the meantime, the Navy began garnishing the ex-husband's pay at the rate of about $460 per month. *Id.* at 802. The Navy tendered its first check in June 1984. *Id.* The principal issue before the court of appeals was whether the child support statute subjected the government to liability to Loftin for the $38,000. *Id.* at 808. The court, following an analysis comparable to ours but framed in terms of sovereign immunity, held that only "moneys due a federal employee at the time" the government is served with legal process "are subject to superimposed state garnishment laws." *Id.* at 809. therefore, "Congress determined that the government could act as a collection agent in certain cases, but"--here is the critical part for our purposes--"created no right of action against the government for moneys owed by its employees to third parties." *Id.* We give a similar interpretation to § 5520a(b).[3]

In sum, we hold that § 5520a(b) does not permit the Bank to recover damages from the United States for its failure to garnish the wages of its employees. We therefore do not need to consider whether the government waived its

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[3] At the end of its opinion, the *Loftin* court directed the government "to pay over to Loftin the money it should have withheld from February to June "1984. 767 F.2d at 810. This order was unaccompanied by any legal analysis. Given the court's statements earlier in the opinion that only the employee's pay is subject to legal process, the court must have supposed that the government could recoup the judgment by making deductions from the ex-husband's future Navy paychecks, something that could not be done here because Randolph is no longer employed at the State Department.

sovereign immunity from such actions.

Reversed.

APPENDIX B
OPINION OF DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FIRST VIRGINIA BANK,	)	
	)	
Plaintiff;	)	
	)	
v.	)	
	)	
VERA RANDOLPH,	)	Civil Action
	)	No. 95-0919
and	)	(PLF)
	)	
UNITED STATES OF AMERICA	)	
U.S. DEPARTMENT OF STATE,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This collection action began in 1982 in the Superior Court of the District of Columbia, where First Virginia Bank obtained a judgment for a commercial debt against Vera Randolph, an employee of the Department of State. At that time, the wages of federal employees were not subject to garnishment for commercial debts. First Virginia made several attempts to execute on the judgment obtained against Ms. Randolph, but was only able to recover a portion of the debt.

In another attempt to recover the debt from Ms. Randolph, First Virginia revived the judgment by an Order of Revival entered by the Superior Court on February 14, 1994, pursuant to the Hatch Act Reform Amendments of 1993, 5 U.S.C. § 5520a. The Hatch Act Reform Amendments for the first time permitted creditors to obtain garnishment of the wages of federal employees for commercial debts. With the revived judgment in hand, First Virginia filed a Writ of Attachment on the federal government to act as garnishee, and the Department of State began garnishing Ms. Randolph's wages on or about April 1, 1994. First Virginia began to receive bi-weekly payments from the federal government in the amount of $200.83.

On or about November 21, 1994, the federal government received notice from Ms. Randolph that she had filed a Motion to Quash the garnishment of her wages. In response, the Department of State terminated the garnishment by ceasing to withhold sums from Ms. Randolph's wages and halting the bi-weekly payments to First Virginia. First Virginia Bank received its last payment on December 27, 1994, at which time $4,368.25 plus interest remained outstanding on Ms. Randolph's debt.

Ms. Randolph retired from the Department of State on December 30, 1994. On January 19, 1995, she received a final paycheck for her last forty hours of work, her unused annual leave and an early-out bonus, totaling $17,563.50. After that payment, the federal government no longer held any funds belonging to Ms. Randolph and no longer owed her any money. On April 28, 1995, First Virginia filed a Motion for Judgment of Recovery against the government, seeking a portion of the final payment it already had made to Ms. Randolph.

Subsequent to Ms. Randolph's retirement and the filing of the motion for judgment of recovery against the federal government, Ms. Randolph's Motion to Quash the garnishment was denied as moot. Superior Court Judge Ellen Huvelle reasoned that since Ms. Randolph was retired and the government no longer held any funds owed to her, the Writ of Attachment was no longer in effect. On May 15, 1995, the federal government removed the action for Judgment of Recovery from the Superior Court of the District of Columbia to this Court.[1]

The government filed a motion to dismiss this action pursuant to Rules 12(b)(1) and (6), Fed. R. Civ. P., or, in the alternative, for summary judgment pursuant to Rule 56, Fed. R. Civ. P. First Virginia opposed the government's motion and filed a cross motion for summary judgment. [2] The Court grants plaintiff's cross-motion for summary judgment and denies defendant's motion for summary judgment.

DISCUSSION

The Hatch Act Reform Amendments of 1993, 5 U.S.C.

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[1] A garnishment action under District of Columbia law is a civil action susceptible to removal pursuant to 28 U.S.C. §1442(a)(1). *See Nationwide Investors v. Miller*, 793 F.2d 1044, 1045 (9th Cir. 1986).

[2] Rule 56 provides for judgment as a mater of law where there are no genuine issues of material fact in dispute. The parties agree to all the material facts in this case thus the only disputes relate to questions of law. A motion for summary judgment is particularly appropriate if the claim turns on a legal, not a factual, question. *Dorman v. Satti*, 678 F. Supp. 375, 379 (D. Conn.), *aff'd*, 862 F.2d 432 (2nd Cir. 1988), *cert. denied*, 490 U.S. 1099 (1989).

§ 5520a, for the first time, allowed the garnishing of the wages of federal employees to satisfy commercial debts.[3] Under the Hatch Act Reform Amendments, state or local law controls the garnishment of wages. 5 U.S.C. § 5520a(a)(3).

The parties disagree on both the meaning of District of Columbia garnishment law and the meaning of the Hatch Act Reform Amendments. The government argues that when an employer is given notice of a motion to quash a garnishment, District of Columbia garnishment law does not require an employer to continue to withhold sums from its employee's paycheck. Thus, if contends, the employer cannot be held liable for failing to withhold those wages. The government also insists that, even if it has misinterpreted District of Columbia law and a private employer in the District of Columbia would be held liable in such circumstances, the Hatch Act Reform Amendments do not waive sovereign immunity with respect to such claims.

First Virginia argues that District of Columbia garnishment law requires an employer to continue to withhold percentages from its employee's wages until any pending motion to quash the garnishment is resolved. Thus, the failure to withhold such sums is a breach of a statutory obligation and renders the employer liable for the amount it wrongly failed to withhold. Further, First Virginia claims that the federal government is not exempt from liability since the Hatch Act Reform Amendments provide that the federal government is subject to legal process in the same manner and "to the same extent as if the agency were a private [employer]." 5 U.S.C. § 5520(a)b.

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[3] Prior to the Hatch Act Reform Amendments, the garnishment of federal employees' wages was only permissible for child support and alimony payments pursuant to 42 U.S.C. § 659.

The resolution of this dispute turns on two questions. First, whether District of Columbia law imposes on a private employer a continuing duty to withhold the appropriate percentages form an employee's garnished wages, notwithstanding notice of a Motion to Quash the garnishment, and, if so, the extent of its liability for failing to withhold the proper amount. Second, assuming such a continuing duty, whether the government has waived sovereign immunity with respect to claims against it for failure to withhold the specified amount.

A. *The Duty to Withhold Wages*

Under District of Columbia law, an employer upon whom a writ of attachment is severed shall "*withhold and pay*" to the judgment creditor the percentages to which it is entitled until the "attachment is wholly satisfied." D.C. Code § 16-573(a)(emphasis added). The next subsection of the Code provides that:

> [u]pon written notice of any court proceeding attacking the attachment or the judgment on which it is based, the employer shall make no further payments to the judgment creditor or his legal representative until receipt of an order of court terminating the proceedings; except that, in the case of child support judgments, the employer shall continue to withhold the payments from the judgment debtor until receipt of an order of the court terminating the withholding.

D.C. Code § 16-573(b). The question is whether the recipient of such a notice is required to continue to withhold payments from the judgment debtor even though it is not longer permitted to make payments to the judgment creditor. The Court has been unable to locate any relevant District of Columbia cases interpreting these provisions.

The government argues that the final clause of section 16-573(b), "except that, in the case of child support judgments, the employer shall continue to withhold...," means that the duty to continue to withhold wages in the face of a motion attacking the garnishment continues only in child support cases. The Court disagrees with the government's position.[4]

First, Section 16-573(a) explicitly directs the withholding *and* payment of wages to a creditor pursuant to an attachment; Section 16-573(b) affirmatively discontinues only the payment aspect of that obligation when there is an attack on the attachment: "[u]pon written notice...the employer shall make no further payments...." It does not discontinue the duty to withhold wages. Without statutory language terminating the duty to withhold, the Court concludes that the obligation to withhold wages persists despite a motion to quash the garnishment.

Second, the child support clause, which was added to the D.C. Code in 1985, does not negate the employer's duty to

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[4] Indeed, it seems that even Ms. Randolph disagrees with the government's position. Ms. Randolph's attorney, in a letter to the Department of State notifying it of the Motion to Quash the garnishment, instructed the Department that according to section 16-573(b), "you are required to case payments to First Virginia Bank." The letter did not instruct the Department to stop withholding money from Ms. Randolph's wages.

withhold wages in non-child support cases; instead, it emphasizes the obligation to continue such withholding in child support cases. There is no indication in the language of the 1985 child support amendment that it was intended to change the meaning of the unamended portion of the statute.

Finally, the government's position on the construction of the D.C. garnishment statute is inconsistent with the policy behind and purpose of a garnishment. A writ of garnishment is designed to prevent the garnishee "from prematurely disposing of any assets belonging to the judgment debtor that come into the garnishee's hands at any time prior to the resolution of the garnishment proceeding." *Cocco v. Merchants Mortgage Co.*, 516 A.2d 596, 598 (Md. Ct. Spec. App. 1986) (citations omitted). Thus, the garnishee has a duty to withhold the attached assets "until the entry of a judgment in the garnishment action." *Fico, Inc. v. Ghingher*, 411 A.2d 430, 437 (Md. 1980); *Marvins Credit, Inc. v. Westinghouse Elec. Supply Co.*, 130 A.2d 777, 780 (D.C. 1957) (when funds are impounded under an attachment, they come under the control and supervision of the court, and accordingly there can be no 'release' of the attachment so as to render the proceeding moot without a proper court order) (citing 5 Am. Jur. *Attachment & Garnishment*, § 658 (1936)); *Mandel v. Lofton*, 89 A.2d 880, 881 (D.C. 1952) (where there is an appeal of a quashed attachment, "pending the appeal the garnishee was bound to retain the money in his hands.") (citing *Byran v. Duncan*, 19 D.C. (8 Mackey) 379 (D.C. 1890)); 38 C.J.S. *Garnishment* § 181 (1943) ("the garnisher's lien or right continues during the period the writ is in effect, which ordinarily is until the final disposition of the case....").

The Court finds the reasoning of these authorities persuasive and entirely consistent with the plain language and purpose of Section 16-573 of the D.C. Code both before and after its amendment. Allowing pending motions to quash a garnishment to terminate an employer's duty to withhold wages pursuant to an attachment would clash with public policy as well as with the mandate of the statute.

B. *Liability for Failing to Withhold Wages*

An employer who fails to withhold monies from its employees wages after receiving notice of a Motion to Quash the garnishment become liable to the judgment creditor for failing to meet its obligation. D.C. Code § 16-575.[5] In *Metropolitan Roofing and Sheet Metal Co. v. Franklin Investment Co.*, 256 A.2d 913, 915 (D.C. 1969), the District of Columbia Court of Appeals explained that an employer is not liable for failing to garnish wages if, at the time the writ of attachment is received, the employer owes no wages to the judgment debtor and no additional wages become due prior to the termination of employment. On the other hand, if additional wages do become due between receipt of the writ of attachment and termination of employment, it follows that the employer is liable for failing to withhold wages. In such

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[5] Section 575 provides:

> If the employer-garnishee fails to pay to the judgment creditor the percentages prescribed in this subchapter of the wages which become payable to the judgment debtor for any pay period, judgment shall be entered against him for an amount equal to the percentages with respect to which the failure occurs.

a situation, the employer would be subject to garnishment. *See Household Finance Corp. v. Training Research and Development, Inc.*, 316 A.2d 850, 852 (D.C. 1974)(the garnishment statute "provides for a continuing levy against a judgment debtor's wages until the judgment is satisfied."). Thus, the Court concludes that under District of Columbia law a private employer would be liable to a creditor for the amount it failed to withhold for a judgment debtor's wages prior to the final disposition of a Motion to Quash the garnishment. D.C. Code §§ 16-573, 16-575.

C. *The Effect of the Hatch Act Reform Amendments*

Prior to the Hatch Act Reform Amendments, except in a few specific cases, "sovereign immunity prevent[ed] the creditor of a federal employee from collecting a debt through a judicial order requiring the United States to garnish the employee's salary." *Franchise Tax Board of California v. United States Postal Service,* 467 U.S. 512, 516-17 (1984) (citing *Buchanan v. Alexander,* 45 U.S. (4 How.) 20 (1846)). First Virginia contends that Congress waived sovereign immunity with the Hatch Act Reform Amendments which provide, in relevant part, that "pay from an agency to an employee is subject to legal process in the same manner and to the same extent as if the agency were a private person." 5. U.S.C. § 5520a(b).[6] The federal government insists that it has not waived its immunity and thus cannot be liable in the same manner as a private employer who fails to withhold

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[6] "Pay" means any compensation received for personal services, but does not include awards for making suggestions. 5 U.S.C. § 5520a(a)(4). In addition, any other compensation pay, including lump-sum leave payments, is "pay" within the meaning of the Hatch Act. 5 C.F.R. § 582.102(e) (1995). "Legal process" is a "writ, order, summons or other similar process in the nature of garnishment..." 5 U.S.C. § 5520a(a)(3).

properly.

"[T]he United States, as sovereign, is immune from suit save as it consents to be sued...." *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981). Waivers of sovereign immunity must be "construed strictly in favor of the sovereign," and not "enlarge[d] beyond what the language [of the statute] requires." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983). The Court concludes that the Congress waived sovereign immunity from suit in passing the Hatch Act Reform Amendments of 1993.

The relevant portion of the Hatch Act Reform Amendments and implementing regulations explicitly state that monies owed as wages to a federal employee are subject to the same legal process "as if the agency were a private person." 5 U.S.C. § 5520a(b); 5 C.F.R. § 582.101 (1995). The government contends that this language is intended to treat federal *employees* the same as private *employees,* and not federal *employers* the same as private *employers*. But the statute and regulation explicitly state that an agency is to be treated "as if the *agency* were a private person" (emphasis added). This language waives sovereign immunity by placing the federal government on the same plane as a private employer with respect to garnishment of employees' wages.

The Hatch Act Reform Amendments do contain certain express limits on the waiver of sovereign immunity, for example to protect the government from claims filed by its employees claiming wrongful garnishment. 5 U.S.C. § 5520a(g). [7] There is no express exception from liability

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[7] All other exceptions in the Hatch Act Reform Amendments concern the type of pay that is garnishable and caps on the amount that may be garnished. 5 C.F.R. § 582.103 (1995).

to a judgment creditor for the government failing to withhold the required amounts from an employee's wages. In fact, the regulations adopted pursuant to the Hatch Act Reform Amendments assume that the government is liable in cases such as this one because they provide that where the government wrongly determines not to honor legal process, but corrects its initial determination or is required to do so by a court, the agency will not "be required to pay more than if it had originally honored the legal process." 5 C.F.R. § 582.305(g) (1995). Although obviously only the Congress, not the Office of Personnel Management through regulations and administrative interpretations, can waive sovereign immunity, such implementing regulations must be given "controlling weight, unless they are arbitrary, capricious, or plainly contrary to the statute." *United States v. Morton*, 467 U.S. 822, 834 (1984) (deciding the extent of immunity regarding child support and alimony payments).

The Court's interpretation is also consistent with that given to virtually identical language in an analogous statute providing for garnishment of unpaid child support and alimony. *See* 42 U.S.C. § 659. That statute provides that pay "shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments." 42 U.S.C. § 659(a). While there are not many cases interpreting the relevant language in Section 659(a), the most persuasive authority indicates that a private employer who wrongfully fails to withhold wages can be held liable for such failure, and that the language in 659(a) waives sovereign immunity and allows the federal government to be liable as well.

In *Young v. Young*, 547 F. Supp. 1 (W.D. Tenn. 1980),

the government was found to have inadvertently overlooked a garnishment. The Court stated

> § 659 abrogates sovereign immunity to the extent of lawful garnishments, whether or not the government complies with its obligation to withhold. Thus the government is liable for any funds it failed to withhold, plus interest. Although this money is not longer "due" or payable to the employee, it was payable at the time of the garnishment and rightfully belonged to the plaintiff through operation of § 659. Having in effect transferred funds which it did not have a right to transfer [the government] must make restitution.

Id. at 5. *See also Loftin v. Rush*, 767 F.2d 800 (11th Cir. 1985) (despite the strict construction regarding sovereign immunity, the government is liable for funds it should have withheld pursuant to an attachment). As the Court said in *DeTienne v. DeTienne,* 815 F. Supp. 394, 397 (D. Kan. 1993), "[r]eturning to 42 U.S.C. § 659(a), the court finds the language which imposes liability 'in like manner and to the same extent as if the United States...were a private person[]'...means that the question of whether such moneys will be subject to legal process is to be determined in accordance with state law in like manner as if the United States were a private person."

Only one court has held that the language of Section 659(a) is not a wavier of sovereign immunity regarding claims against the government for failing to withhold the

amounts specified in an attachment. *See Green v. Green*, 106 Daily Wash. L. Rep. 1201 (Sup. Ct. D.C. 1978). The result in *Green*, however, runs counter to the plain language of the statute as well as to the policy underlying it. It would permit through garnishment the recovery of child support or alimony from a federal employee delinquent in payments, but deny any means to enforce such a judgment if the government failed to uphold its legal obligation. The outcome in *Green v. Green* neutralizes the very purpose of Section 659. "[I]t allows government negligence to frustrate congressional intent." *Young v. Young*, 547 F. Supp. at 4. The Court rejects the reasoning of *Green v. Green* and instead accepts the analysis in *Young* and its progeny.

CONCLUSION

At the time that Ms. Randolph's Motion to Quash the garnishment was filed, a valid writ of attachment was in effect. During the period between the filing of the motion to quash and Ms. Randolph's retirement, the Department of State owed monies to Ms. Randolph. Since the Motion to Quash the garnishment did not relieve the government of its duty to withhold the requisite amount from Ms. Randolph's wages, the government is liable to First Virginia Bank for the amount that it failed to withhold.

There is some discrepancy in the parties' papers concerning the proper amount of damages to be awarded to First Virginia Bank. Accordingly, First Virginia is directed to file, on or before April 12, 1996, a declaration describing the proper calculation of damages. The United States may respond to First Virginia's calculation on or before April 26, 1996. A separate order will be issued this same day granting First Virginia Bank's motion for summary judgment. Final

judgment will be entered after the receipt of the papers concerning the proper calculation of damages.

SO ORDERED.

/s/
PAUL L. FRIEDMAN
United States District Judge

DATE: 3/28/96

Filed March 29, 1996

APPENDIX C
ORDER ON PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-5205 September Term, 1996
95 cv00919

FIRST VIRGINIA BANK,

Appellee,

v.

UNITED STATES OF AMERICA,
and DEPARTMENT OF STATE,

Appellants.

BEFORE: Williams, Henderson and Randolph, Circuit Judges

ORDER

Upon consideration of appellee's petition for rehearing filed May 27, 1997, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner

Robert A. Bonner
Deputy Clerk

Filed: June 12, 1997

APPENDIX D
STATUTES AND REGULATIONS INVOLVED

5 U.S.C. § 5520a. Garnishment of pay

(a) For purposes of this section--

. . .

(3) "legal process" means any writ, order, summons, or other similar process in the nature of garnishment, that--

(A) is issued by a court of competent jurisdiction within any State, territory, or possession of the United States, or an authorized official pursuant to an order of such a court or pursuant to State or local law; and

(B) orders the employing agency of such employee to withhold an amount from the pay of such employee, and make a payment of such withholding to another person, for a specifically described satisfaction of a legal debt of the employee, or recovery of attorney's fees, interest, or court costs; and

(4) "pay" means--

(A) basic pay, premium pay paid under subchapter V, any payment received under subchapter VI, VII, or

VIII, severance and back pay paid under subchapter IX, sick pay, incentive pay, and any other compensation paid or payable for personal services, whether such compensation is denominated as wages, salary, commission, bonus pay or otherwise; and

(B) does not include awards for making suggestions.

(b) Subject to the provisions of this section and the provisions of section 303 of the Consumer Credit Protection Act (15 U.S.C. 1673) pay from an agency to an employee is subject to legal process in the same manner and to the same extent as if the agency were a private person.

. . .

42 U.S.C. § 659. Enforcement of individual's legal obligations to provide child support or make alimony payments

(a) United States and District of Columbia to be subject to legal process

Notwithstanding any other provision of law (including section 407 of this title) effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to

any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

. . .

5 C.F.R. PART 582--COMMERCIAL GARNISHMENT OF FEDERAL EMPLOYEES' PAY

SUBPART A--PURPOSE, DEFINITIONS, AND EXCLUSIONS

§ 582.102 Definitions.

(3) *Legal Process* means any writ, order, summons, or other similar process in the nature of garnishment which may include an attachment, writ of execution, court ordered wage assignment, or tax levy from a State or local government, which--

(i) Is issued by:

(A) A court of competent jurisdiction, including Indian tribal courts, within any State, territory, or possession of the United States, or the District of Columbia. As stated in §

582.101, pay is subject to legal process in the same manner and to the same extent as if the agency were a private person. There is, therefore, no requirement in this part that, for example, legal process be signed by a Judge; or

(B) An authorized official pursuant to an order of a court of competent jurisdiction or pursuant to State or local law; or

(C) A State agency authorized to issue income withholding notices pursuant to State or local law; and

(ii) Orders an agency to withhold an amount from the pay of an employee-obligor and to make a payment of such withholding to a *person*, for a specifically described satisfaction of a legal debt of the employee-obligor, or recovery of attorney fees, interest, or court costs.

. . .

SUBPART C--COMPLAINCE WITH LEGAL PROCESS

§ 582.305 Honoring legal process.

. . .

(g) Neither the United States, as executive agency, nor any disbursing officer shall be liable for any payment made from moneys due from, or payable by, the United States to any individual pursuant to legal process regular on its face, if such payment is made in accordance with this part. Where an agency initially determines that legal process should not be honored, if it subsequently determines that its initial determination was erroneous, it may correct its initial determination and honor the legal process. If an agency corrects an error or is required to do so by a court or other authority, under no circumstances will the agency be required to pay more than if it had originally honored the legal process.

. . .

APPENDIX E
OTHER MATERIAL:
PETITION FOR REHEARING

ORAL ARGUMENT HELD JANUARY 24, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FIRST VIRGINIA BANK,	)	
	)	
Appellee;	)	
	)	
v.	)	
	)	
VERA RANDOLPH,	)	No. 96-5205
	)	
Defendant;	)	
	)	
UNITED STATES OF AMERICA	)	
AND	)	
U.S. DEPARTMENT OF STATE;	)	
	)	
Appellants.	)	

APPELLEE FIRST VIRGINIA BANK'S
SUGGESTION FOR REHEARING *IN BANC*
AND
PETITION FOR REHEARING

Appellee First Virginia Bank (hereafter "First Virginia") hereby requests both that this matter be reheard by this Court sitting *in banc* and that the panel of this Court which issued an opinion on April 11, 1997, reconsider that decision and

rehear this matter.

CONCISE STATEMENT OF ISSUE AND ITS IMPORTANCE

This case presents a matter of first impression which has serious ramifications beyond the confines of this case or the statute at issue. Furthermore, these harmful consequences result from a fundamental misapprehension of the initial writ and ensuing processes at issue in this matter.

The April 11, 1997, opinion of a panel of this Court (hereafter "the April 11 Opinion"), attached hereto as Exhibit 1, is the first known judicial review of 5 U.S.C. § 5520a, a statute which for the first time allowed the pay of federal employees to be garnished through state garnishment processes (hereafter "the commercial garnishment statute"). As the April 11 Opinion recognizes, the commercial garnishment statute is modeled on a nearly identical statute allowing garnishment of the pay of federal employees who owe child support, 42 U.S.C. § 659(a) (hereinafter "the child support statute"). There are several decisions interpreting the child support statute which are at odds with the April 11 Opinion.

More importantly, the similarity of the two statutes leads to the inevitable conclusion that the government will use the April 11 Opinion as a shield to deprive children of support when the government mishandles a federal employee's child support garnishment. The commercial garnishment statute merely serves as a more publicly acceptable vehicle to obtain a precedent which could have a devastating effect on the country's child support policy. If the opinion stands, the victims of reportedly common government misfeasance--needy children--will be left without any remedy.

Secondly, the April 11 Opinion turns on a definition of "legal process" which is incorrect. The opinion erroneously presumes that the writ which commences the garnishment is separate and distinct from the process of enforcing that writ against a garnishee who does not comply with its terms. The fallacy of this presumption is proven by the very writ of garnishment which initiated this case. That writ on its face warned the government that disobedience of the writ would make the government accountable to the judgment creditor--First Virginia. The proceeding to enforce this writ against this disobedient garnishee was merely ancillary to the writ itself. Thus, the April 11 Opinion is incorrect when it characterizes First Virginia's recovery from the government as a separate proceeding not "in the nature of a garnishment."

The District of Columbia garnishment principles applicable here comport with those of many states. In the commercial garnishment statute, Congress made federal employers subject to state garnishments. The power to compel obedience to a garnishment writ, or to impose damages for disobedience, is part and parcel of any garnishment. Therefore, the April 11 Opinion also thwarts the statutory scheme and Congressional intent.

ARGUMENT

Several key facts in this case bear repeating. After the government had been obeying the writ of garnishment for some time, Ms. Randolph strategically moved to quash the writ shortly before retiring from government service. Without waiting for the court to rule on the motion, the government stopped garnishing her wages. It is undisputed that the government was wrong in doing so.

A few weeks after inducing the government to stop its

withholding, Ms. Randolph left government service, receiving a final paycheck of over $17,500.00--several times the outstanding amount due First Virginia at the time.[1] By the time the error was detected, the government claimed it had no more pay to give Ms. Randolph.

Thereafter, First Virginia filed a "Motion for Judgment of Recovery Against Garnishee." This motion was simply another step in the same proceeding as that in which the original writ of garnishment was issued, and was assigned the same docket number. First Virginia's recovery was pursuant to this motion.[2]

I. The April 11 Opinion Depends On An Incorrect Definition Of "Legal Process."

The linchpin of the April 11 Opinion is its characterization of First Virginia's Motion for Judgment of Recovery Against Garnishee as a separate "damage action." Slip op. at 7-9. The opinion states that this request for relief

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[1] It is undisputed that this check, and the "bonus" and other components it contained, constituted "pay" within the meaning of the commercial garnishment statute, *see* 5 U.S.C. § 5520a(a)(4); 5 C.F.R. § 582.102(5) (1996), and District of Columbia garnishment law. *See* D.C. Code Ann. § 16-571(1) (1989).

[2] The amount the court awarded First Virginia does not evidence the true extent of the obligation avoided by Ms. Randolph's scheme. In fact, Ms. Randolph evaded paying First Virginia over $4400.00. The only reason the award was less was that well after First Virginia's motion was filed, but shortly before the District Court made the award, Ms. Randolph's long-lost ex-husband came forward. Although the original judgment was also against him, his whereabouts had been unknown to First Virginia for years. He initiated contact with First Virginia after the judgment against him was detected during a credit check made pursuant to his application for a mortgage.

was "not 'in the nature of a garnishment'" and thus not "legal process," as defined in the commercial garnishment statute. Id. at 7-8. Because the statute allows only "legal process" against the government for garnishment of federal employees' pay, the opinion concluded that First Virginia's recovery from the government was not allowed.

A. The Original Writ Of Garnishment Contemplated Recovery By First Virginia From The Government For The Government's Mistakes.

Clearly, the original writ of garnishment in this matter (called a "Writ of Attachment on a Judgment")[3] falls within the commercial garnishment statute's definition of "legal process." That original writ was what summoned the government to appear in this matter.

This original writ on its face warned the government: "NOTICE TO EMPLOYER-GARNISHEE: . . . judgment may be entered against you for the entire amount of the plaintiff's claims with interest and costs." Thus, the original writ contemplated recovery from the government for its actions pursuant to the writ.

The commercial garnishment statute made the government subject to "legal process"
-- including the writ in this matter -- without qualification. The power to penalize disobedience was assumed within that original writ. Because the writ specifically warned the government that disobedience could result in a sanction equal to the full amount of First Virginia's judgment against Ms.

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[3] Although it is a part of the record in this matter, for the convenience of the Court a copy of this original writ is attached hereto as Exhibit 2.

Randolph, then it also allowed a penalty in any lesser amount. The amount ultimately awarded First Virginia was far less than the maximum specified on the face of the writ and far less than what the government paid Ms. Randolph by mistake.

B. If The Government Is Subject To A Writ of Garnishment, It Is Also Subject To Enforcement Of That Writ.

It is axiomatic that a court has the inherent power to enforce its orders. *See Waffenschmidt v. Mackay*, 763 F.2d 711, 716 (5th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986); 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2960 at p. 581 (1973) [hereinafter Wright & Miller]. This is an essential adjunct to the administration of justice. *See Young v. United States ex rel. Vuitton Et Fils S.A.*, 481 U.S. 797, ___, 107 S. Ct. 2124, 2132 (1987). Enforcement of an order by the issuing court is regarded as a continuation of the same case in which the order was issued. Wright & Miller, *supra,* at p. 589. Damages may be awarded in enforcement proceedings. *Hutto v. Finney,* 437 U.S. 678, 691 (1978); *Thyssen, Inc. v. S/S Chuen On,* 693 F.2d 1171, 1173 (5th Cir. 1982).

A writ of garnishment is a court order. Indeed, the original writ in this matter is replete with commands to the garnishee. Like any other court order, a writ of garnishment may be enforced by the court that issued it.

First Virginia's recovery in this matter was the result of such an enforcement action. While contemplated on the face of the writ and specifically allowed by District of Columbia law, First Virginia's recovery was really just another means of enforcing disobedience of the writ, and was merely a

continuation of the same proceeding.

C. First Virginia's Request For Recovery Was Not A New Or Different Proceeding.

First Virginia's recovery in this matter was pursuant to a *motion*, not a "writ, order, summons, or similar process," as "legal process" is defined in the commercial garnishment statute. *See* 5 U.S.C. § 5520a(a)(3)(A). "The word 'process,' however, as now commonly understood, refers to a summons, or, summons and complaint, and, less commonly, to a writ." *Black's Law Dictionary* 1085 (5th ed. 1979). The only "legal process" in this matter was the original writ of garnishment.

First Virginia's motion was merely ancillary to, and in aid of, the original writ. No new process had to be issued. The government was already before the court. The decision to award First Virginia amounts which the government wrongfully failed to withhold from Ms. Randolph's pay was thus not a new or different proceeding. In fact, because it was contemplated in the original writ and was pursuant to that writ, it was very much "in the nature of a garnishment." 5 U.S.C. § 5520a(a)(3). The April 11 Opinion's attempt to distinguish the award to First Virginia therefore cannot be maintained.

II. The April 11 Opinion Misapplies Applicable District of Columbia Law.

The commercial garnishment statute makes the government subject to state garnishment law. Here, the applicable "state" is the District of Columbia. However, the opinion misinterprets and misapplies District of Columbia garnishment law.

A. A District of Columbia Garnishment Dispossesses The Garnishee Of The Attached Funds.

As noted on the face of the writ of garnishment, a garnishee is liable to the plaintiff's (judgment creditor) if the garnishee disobeys the writ. This can be for the full amount of the creditor's judgment against the debtor. D.C. Code Ann. § 16-556(b) (1989); *Wrecking Corp. of Am. v. Jersey Welding Supply, Inc.*, 463 A.2d 678, 680 (D.C. 1983); *see United States v. Thornton*, 672 F.2d 101, 108-09 (D.C. Cir. 1982). Or, in the case of a partial payment by the garnishee, it can be that portion of the creditor's judgment which remains unpaid. D.C. Code Ann. § 16-575 (1989); *Household Fin. Corp. v. Training Research and Dev., Inc.*, 316 A.2d 850, 851 (D.C. 1974). "The garnishee . . . acts at his peril if he withholds too much or too little." *Landahl, Brown & Weed Assoc., Inc. v. Houston,* 404 A.2d 934, 935 (D.C. 1979).

When the garnishee does not fully perform its obligations, the term of art used under District of Columbia law to denominate the judgment creditor's request for relief is "motion for judgment of recovery." *See Household Fin. Corp.*, 316 A.2d 850. This is what First Virginia filed here. Case law makes it clear that a motion for judgment of recovery is merely a step in aid of enforcement of the original writ, and not a new proceeding. *Id.; see Consumers United Ins. Co. v. Smith,* 644 A.2d 1328, 1352 (D.C. 1994); *cf. Thornton,* 672 F.2d at 106 (D.C. Cir.).

Recovery from the garnishee is possible because of the nature and effect of garnishment. As stated on the face of the original writ in this matter, in the District of Columbia, garnishment is a continuing levy. D.C. Code Ann. §§ 16-572, 16-573(a)(2) (1989). The levy attaches at the time the

writ of garnishment is served. *See Monarch Life Ins. Co. v. Elam,* 918 F.2d 201, 203 (D.C. Cir. 1990); *see generally Rab v. Safeco Ins. Co. of Am.,* 556 A.2d 1072 (D.C. 1989). This levy by service accomplishes a seizure of the property (including funds), placing it "'in the custody of the law.'" *Herman v. Siney,* 190 A.2d 650, 651 (D.C. 1963), quoting *Hagan v. Lucas,* 35 U.S. 400, ___ (1836). From that point on, the attached funds are under the control of the court. *Herman,* 190 A.2d at 651, *see Consumers United Ins. Co.,* 644 A.2d at 1352-53.

B. The Money The Government Erroneously Paid Ms. Randolph Was Not Her Pay.

Thus, under District of Columbia law, at the time of service of the original writ of garnishment, a portion of Ms. Randolph's wages were effectively seized by the District of Columbia courts. In disposing of these funds without court permission, the government disobeyed a writ to which it was subject. The District of Columbia courts were possessed of the power to punish the government by virtue of the original writ.

Furthermore, by operation of District of Columbia law, the garnished wages were not Ms. Randolph's property at the time the government mistakenly delivered them to her, nor were they at that time the property of the government. By improperly giving these funds to Ms. Randolph, the government gave away somebody else's property. Further, because neither the government nor Ms. Randolph had title to the property, these funds could not have been Ms. Randolph's "pay." Thus, the question of whether or not these

funds at one time constituted "pay" drops out of the analysis.[4]

III. District of Columbia Garnishment Law Is Consistent With General Principles Of State Garnishment Schemes, And These Principles Show How The Commercial Garnishment Statute Should Be Applied.

In adopting the commercial garnishment statute, Congress acknowledged that state law would provide the substantive principles by which garnishment of federal employees would be accomplished. Therefore, Congress contemplated that these state laws would govern the implementation of the commercial garnishment statute. These state laws, and the general principles that emerge from them, illustrate what the commercial garnishment statute means and how it should be interpreted and applied.

A. Garnishees Are Generally Liable For Mishandling Wage Garnishments.

Like the District of Columbia, the Virginia garnishment summons[5] "'warns' the garnishee not to pay the judgment debtor's money to the judgment debtor, with the sanction that if the garnishee were to do so, it would become personally liable for the amount paid." *United States v. Harkins Builders, Inc.*, 45 F.3d 830, 833 (4th Cir. 1995); *In re Lamm*, 47 B.R. 364, 368 (E.D. Va. 1984); *In re Acorn Elec. Supply,*

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[4] Alternately, if the government gave away something other than Ms. Randolph's pay, then the funds constituting her pay remained in the government's hands. Contrary to the April 11 Opinion's hypothesis, this retained "pay" was recoverable by First Virginia.

[5] The Virginia garnishment summons is a statutory form. *See* Va. Code Ann. § 8.01-512.3 (Supp. 1996).

Inc., 348 F. Supp. 277, 280 (E.D. Va. 1972).

As in the District of Columbia, a garnishee's liability for disobeying a writ of garnishment is common. 6 Am. Jur. 2d Attachment and Garnishment § 512 (1963); 30 Am. Jur. 2d Executions and Enforcement of Judgments § 745 (1994); *see* Ariz. Rev. Stat. § 12-1598.13 (1997); Conn. Gen. Stat. § 52-361a (1997); Ga. Code Ann. §§ 18-4-62, 18-4-90, 18-4-92 (1996); Fla. Stat. Ann. § 77.06 (19xx); Ind. Code § 34-1-11-21 (1997); N.Y. Pers. Prop. Law § 5231 (Consol. 1997); Wash. Rev. Code §§ 6.27.200 - 6.27.270 (1997); *see* 735 Ill. Comp. Stat. 5/12-808 (West 19xx); *see also In re Coppie,* 728 F.2d 951, 953 (7th Cir. 1984), *cert. denied,* 469 U.S. 1105 (1985) (Indiana); *United States v. Allen Bros. of Homer, Inc.,* 36 B.R. 920, 923 (M.D. La. 1984) (Louisiana) (garnishee-employer was the State of Louisiana); *Anderson Tully Co. v. Brown,* 383 So.2d 1389, 1390-91 (Miss. 1980).

B. Service Of A Writ Of Garnishment Dispossesses the Garnishee of The Property.

Likewise, the District of Columbia construction of the effect of service of a writ of garnishment accords with general principles. As the Supreme Court held over 125 years ago, "Garnishment almost everywhere exists. . . . It arrests the property in hands of the garnishee . . .and, therefore, has the effect of a seizure." *Miller v. United States,* 78 U.S. 268, 297 (1871) (seizure can be had simply by serving writ; this places property in the court's jurisdiction).[6] Service of a writ of garnishment "causes the

[6] This is consistent with the general view of garnishment as a levy. A levy is deemed a taking of possession by the sheriff, 30 Am. Jur. 2d Executions and Enforcement of Judgments § 213 (1994), although the

funds held, or accruing in the future, to be seized in the hands of the employer." *Allen Bros. of Homer, Inc.*, 36 B.R. at 923; *accord*, In re Connor, 733 F.2d 1560, 1562 (11th Cir. 1984); *In re U.S. Marketing Concepts, Inc.*, 113 B.R. 487, 492 (Bankr. N.D. Ind. 1990); *Chase Commercial Corp. v. Donald Benson Accessories, Inc.*, 69 B.R. 32, 34 (N.D. Tex. 1986).

"Once the lien has attached, without the permission of the garnishor or an order of the court, neither the judgment debtor nor the garnishee can take any action with regard to the property in question which can defeat the judgment creditor's interest in it." *Id.* This is because garnishment is generally regarded as divesting the debtor of title to the garnished funds, and charging the garnishee with the preservation of those funds. 30 Am. Jur. 2d Executions and Enforcement of Judgments § 727 (1994); *accord, In re Coppie*, 728 F. 2d at 952-53, *In re Connor*, 733 F.2d at 1562; *In re Perry*, 48 B.R. 591, 594 (Bankr. M.D. Tenn. 1985); *see In re Momentum Computer Sys. Int'l*, 66 B.R. 512, 514 (N.D. Cal. 1986); *cf. In re Jones*, 47 B.R. at 789. This divestiture also applies prospectively to future wages, as they are earned. 30 Am. Jur. 2d Executions and Enforcement of Judgments § 728 (1994); *accord, In re Perry*, 48 B.R. at 595.

C. The April 11 Opinion Is At Odds With The General Statutory Scheme.

These general garnishment principles are consistent with those of the District of Columbia. Thus, the April 11 Opinion is at odds not only with District of Columbia law

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seizure can be constructive and not actual. *Id.* at § 234. The sheriff's possession is entitled to preference over the claims of others. *Id.* at § 261.

but also with the general scheme of the commercial garnishment statute.

IV. The April 11 Opinion Will Have Dire Consequences For The Enforcement Of Child Support Obligations.

The April 11 Opinion explicitly acknowledges the similarity between the child support statute and the commercial garnishment statute. Slip op. at 9. The latter was expressly modeled on the former (and older) statute. Therefore, interpretations under one statute are applicable to the other. Unfortunately, the April 11 Opinion both misconstrues and ignores precedent under the child support statute. In doing so, the April 11 Opinion itself creates precedent which will have dire consequences for child support.

A. The Opinion Ignores Precedent Under The Child Support Statute.

The April 11 Opinion views its findings as harmonious with *Loftin v. Rush,* 767 F.2d 800 (11th Cir. 1985), a decision under the child support statute. It is not.

In *Loftin,* the Navy inexplicably delayed garnishing its employee's pay for four months after service of the writ of garnishment. The Eleventh Circuit held the Navy liable to the judgment creditor for the amounts that should have been withheld during this period. *Id.* at 810. Thus, *Loftin* is perfectly consistent with the relief requested by First Virginia here; during the period the government wrongfully ceased garnishing Ms. Randolph's wages, she received many times more than the remaining balance due First Virginia.

The April 11 Opinion supposes that the award in *Loftin*

would come from the Navy employee's future earnings. Slip op. at 10, n.3. There is nothing in *Loftin* to support that supposition, and the holding of *Loftin* does not depend on such a fact. Indeed, all *Loftin* does is preclude judgments against the United States "for any amount in excess of that owed [by the government] to the judgment debtor/employee . . . ." 767 F.2d at 808. Thus, all *Loftin* does is prevent a judgment against the government for more than the amount of the pay the federal employee will receive while the garnishment is in effect. The District Court's judgment in the instant matter was well within this parameter.

In reaching its conclusion in *Loftin,* the Eleventh Circuit expressly deferred to regulations defining 42 U.S.C. § 659(a)'s provision that the government "shall be subject, in like manner and to the same extent as if [the government] were a private person," to garnishments for child support. 767 F.2d at 807, n.12. Those regulations also make the government liable for the amount it should have withheld from the pay of the federal employee. *See* 5 C.F.R. § 581.305(e) (1996). An identical provision appears in the commercial garnishment statute's regulations. *See* 5 C.F.R. § 582.305(g). For the April 11 Opinion to be truly harmonious with *Loftin,* it would have to defer to this regulation and affirm the District Court.

First Virginia is aware of at least three other reported cases under the child support statute with facts analogous to those in the present matter. In all three, the government was found liable for mishandling child support garnishments. *See* App. First Va. Bank's Br. at 22-24. By misconstruing *Loftin,* and by ignoring these other opinions, the April 11 Opinion erred. More ominously, it removed any incentive for the

government to effectively process child support garnishments, and it removed any remedy for those children harmed by the government's mistakes.

B. The Costs of Child Support.

The failure of non-custodial parents to fulfill their child support obligations is a significant social problem. Over 6.2 million custodial parents have been awarded support. However, at least one-third of child support awards, or about $5.8 billion per year, goes unpaid. United States Census Bureau, *Who Receives Child Support?* (last modified May 13, 1997) <http://www.census.gov/socdemo/www/chldsupp.html>. Since federal employees comprise about four percent of the workforce, *The Garnishment Equalization Act of 1991: Hearings on S.316 Before the Subcomm. on Fed. Serv., Post Office, and Civil Serv. of the Senate Comm. on Gov't Affairs*, 102d Cong. 26 (1992) [hereinafter *S.316 Hearings*] (statement of Dr. A. Charlene Sullivan), the loss attributable to nonpaying federal employees alone is approximately $232 million.

V. The April 11 Opinion Will Thwart Congressional Intent.

A. The Commercial Garnishment Statute Was Enacted Because Of The Inadequacy Of The Government's Own Efforts To Force Its Employees To Pay Their Debts.

For years prior to the enactment of the commercial garnishment statute, the government had regulations exhorting its employees to pay their debts. Though allowing an employing agency to discipline a federal employee for disobedience, these regulations were ineffective. *See, e.g., S.316 Hearings, supra*, at 4 (statement of Sen. Craig) and at

21 (statement of Jean Barber, Office of Personnel Management). It was the failure of these hortatory, noncompulsory endeavors that prompted the introduction of the legislation resulting in the commercial garnishment statute. *Id.*

B. The Cost Of Ineffective Garnishment Of Federal Employees.

The federal government is the nation's largest employer, having about four percent of all working Americans on its payroll. Interestingly, federal employees are more likely to use consumer credit than average Americans. It is estimated that the amount of delinquent, unpaid consumer debt resulting from federal employees alone totals $400 million to $1.3 billion per year. This loss adversely affects not only the private sector but also federal revenue; it is estimated that the cost to the government of its own employees' bad debt is $300 to $700 million. *Id.* at 26-27 (statement of Dr. A. Charlene Sullivan).

C. The Protection Of Federal Agencies Worked By The April 11 Opinion Was Not Intended By Congress.

The April 11 Opinion shields federal agencies from their mistakes in processing garnishments. However, this protection was not requested by the government during the drafting of the commercial garnishment statute, nor was it intended by Congress.

The legislative history of the commercial garnishment statute shows that the government, through the Office of Personnel Management, was concerned about the liability to which it would be exposed by this legislation. It requested

numerous protections, but none of the sort created by the April 11 Opinion. *S.316 Hearings, supra*, at 14 (statement of Jean Barber) and at 54 (statement of Constance Berry Newman). The requested protections were enacted in the statute, 5 U.S.C. §§ 5520a(e) and (g), and its implementing regulations. *See, e.g.*, 5 C.F.R. §§ 582.202, 582.203, 582.303, 582.304, 582.305(g) and (h) (1996).

However, the government never requested the sort of extra protection it belatedly sought and received through this appeal. In fact, the government itself stated that the child support garnishment statute provided a good model on which to base the provisions of the commercial garnishment statute. *S.316 Hearings, supra*, at 15 and 54. By the time of this statement, the child support statute had been construed to hold the government liable for mishandling child support garnishments, yet the government did not request relief from these decisions. The government had even incorporated an acknowledgement of such liability in the regulations implementing the child support garnishment statute, 5 C.F.R. § 581.305(e) (1996), and adopted a counterpart in the regulations under the commercial garnishment statute. 5 C.F.R. § 582.305(g).

Therefore, the legislative history demonstrates that the protection of the government worked by the April 11 Opinion was not intended by either the government itself or Congress. Indeed, the legislative history, as well as principles of statutory construction, show that such liability was expressly contemplated and is allowed.

D. The April 11 Opinion Renders The Commercial Garnishment Statute Impotent And Thereby Thwarts Congressional Intent.

Congress made federal employees subject to state garnishment actions because of the ineffectiveness of the government's own efforts to police its employees. The April 11 Opinion, however, removes the teeth from the commercial garnishment statute. It puts the responsibility for compliance back with the very institution from which Congress intended to remove it -- the federal government itself.

The legislative history of the commercial garnishment statute is replete with pronouncements that the purpose of the statute is to subject federal employees to the same garnishment rules and processes as their counterparts in the private sector. *See, e.g.*, Senate Comm. on Gov't Affairs, S. Rep. No. 103-57, 103d Cong. 1st Sess. (1993), reprinted in 1993 U.S.C.C.A.N. 1802, 1807-10, 1843; *S.316 Hearings, supra*, at 3, 35, 37, 44, 54. The commercial garnishment statute itself mandates that federal agencies be subject to garnishment writs "in the same manner and to the same extent as if the agency were a private person." 5 U.S.C. § 5520a(b). To assure their efficient and effective handling of garnishment writs, those writs hold private employers liable for failure to comply with the writs' terms. The commercial garnishment statute requires nothing less of federal employers.

This 27th day of May, 1997.

FIRST VIRGINIA BANK
By Counsel

/s/ Mark L. Booz

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(2)

Supreme Court, U.S.
FILED
DEC 8 1997
CLERK

No. 97-451

In the Supreme Court of the United States

OCTOBER TERM, 1997

FIRST VIRGINIA BANK, PETITIONER

v.

UNITED STATES OF AMERICA
AND UNITED STATES DEPARTMENT OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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1688

QUESTION PRESENTED

Whether the Hatch Act Reform Amendments of 1993, which provide for garnishment of a federal employee's pay, also allow commercial judgment debtors to seek recovery from the federal treasury if the government incorrectly failed to garnish an employee's wages and the employee is no longer on the federal payroll.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-451

FIRST VIRGINIA BANK, PETITIONER

v.

UNITED STATES OF AMERICA
AND UNITED STATES DEPARTMENT OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 110 F.3d 75. The opinion of the district court (Pet. App. 13a-26a) is reported at 920 F. Supp. 213.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1997. A petition for rehearing was denied on June 12, 1997. Pet. App. 27a-28a. The petition for a writ of certiorari was filed on September 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Hatch Act Reform Amendments of 1993 (Act) provide that "pay from an agency to an employee is subject to legal process in the same manner and to the same extent as if the agency were a private person." 5 U.S.C. 5520a(b). The Act defines "pay" as "basic pay, premium pay * * * and any other compensation paid or payable for personal services, whether such compensation is denominated as wages, salary, commission, bonus pay or otherwise." 5 U.S.C. 5520a(a)(4). The Act further defines "legal process" as "any writ, order, summons, or other similar process in the nature of garnishment, that * * * (A) is issued by a court of competent jurisdiction * * * and (B) orders the employing agency of such agency to withhold an amount from the pay of such employee, and make a payment of such withholding to another person." 5 U.S.C. 5520a(a)(3).

In 1982, petitioner obtained a judgment in the District of Columbia Superior Court against Vera Randolph, an employee of the State Department. Pet. 1-2. In early 1994, petitioner revived that judgment and obtained a writ of attachment against the federal government, relying on substantive District of Columbia garnishment law and on 5 U.S.C. 5520a(b). The State Department then began garnishing a portion of Randolph's salary. Pet. 2. In November 1994, Randolph notified the State Department that she had filed a motion to quash the garnishment. Pet. App. 3a. Based on the State Department's interpretation of D.C. Code Ann. § 16-573 (1997),[1] the Department

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[1] D.C. Code Ann. § 16-573(b) (1997) provides:

> Upon written notice of any court proceeding attacking the attachment or the judgment on which it is based, the

stopped withholding sums from Randolph's wages and stopped making payments to petitioner. At that time, approximately $4,368.25 of Randolph's debt remained unpaid.[2] Shortly thereafter, Randolph retired. Pet. App. 3a, 14a. She received a final paycheck, a lump sum payment for her unused annual leave, and an "early out" bonus. The government no longer holds any pay belonging to Randolph. *Ibid.* Moreover, although Randolph receives retirement benefits, those benefits are not included in the definition of pay for purposes of commercial garnishment. See 5 U.S.C. 5520a(a)(2) and (4).

2. In April 1995, petitioner moved for judgment of recovery against the government, seeking a monetary award in the amount that petitioner claimed the State Department had incorrectly failed to withhold from Randolph's salary. Petitioner relied on provisions of District of Columbia law providing that private employers are subject to strict liability when, after receiving a garnishment order, they wrongfully fail to pay a judgment creditor the required percentage of an employee's pay. D.C. Code Ann. §§ 16-573, 16-575 (1997).

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employer shall make no further payments to the judgment creditor or his legal representative until receipt of an order of court terminating the proceedings; except that, in the case of child support judgments, the employer shall continue to withhold the payments from the judgment debtor until receipt of an order of the court terminating the withholding.

[2] At the conclusion of the district court proceedings, petitioner acknowledged that most of the debt had been paid. Petitioner therefore seeks only the outstanding principal, $75.71, and costs, $310.00, for a total of $385.71. See Pet. App. 4a.

The government removed petitioner's action to federal district court. That court granted summary judgment in favor of petitioner and awarded $385.71 in compensatory relief. The court rejected the government's argument that, when a commercial debtor moves to quash a writ of attachment, D.C. Code Ann. § 16-573(b) (1997) relieves the debtor's employer of an obligation to continue garnishing the debtor's wages. Pet. App. 18a-19a. Instead, the court held, that provision relieves employers only of their duty to pay the withheld wages immediately to the judgment creditor. *Ibid.* The court also concluded that the Act waived the government's sovereign immunity from liability for amounts of pay that the government incorrectly fails to withhold. *Id.* at 20a-25a.

3. The court of appeals reversed. Pet. App. 1a-12a. As a threshold matter, the court of appeals first determined that jurisdiction in this case does not rest on the "little Tucker Act," 28 U.S.C. 1346(a)(2), and that therefore the District of Columbia Circuit, rather than the Federal Circuit, had jurisdiction over the appeal. Pet. App. 4a-7a. Turning to the merits, the court then held that Section 5520a(b) does not render the United States liable in damages to a judgment creditor for an erroneous failure to garnish a federal employee's wages once that employee has left the federal payroll. *Id.* at 11a.[3]

The court of appeals explained that the statutory language is "nearly decisive" on that issue, because

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[3] The government did not challenge on appeal the district court's interpretation of the D.C. Code. As a result, the court of appeals "assume[d] the State Department should have continued withholding a percentage of Randolph's wages despite her motion to quash." Pet. App. 8a.

Section 5520a(b) makes clear that "it is only the employee's 'pay' that is made 'subject to legal process.'" Pet. App. 8a (citing 5 U.S.C. 5520a(b)). Because Randolph is no longer employed by the State Department, the court held, "there is no longer any 'pay from an agency to an employee' that can be subject to legal process." *Ibid.* The court further noted that any amount recovered by petitioner would come not from the annual appropriation for State Department salaries and expenses, but from the "general appropriation of funds" set aside for the purpose of satisfying judgments against the United States. *Ibid.* (citing *OPM* v. *Richmond*, 496 U.S. 414, 431 (1990); 31 U.S.C. 1304). Thus, the court concluded, what petitioner seeks is, at bottom, an award of compensatory damages under a theory of tort liability. *Id.* at 8a-10a. Because the court found that the Hatch Act Reform Amendments provide petitioner with no cause of action to seek such relief, it did not reach the separate issue of whether the United States had waived its sovereign immunity from this action. *Id.* at 10a-12a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. Section 5520a(b) creates no cause of action against the United States to redress a federal agency's failure to garnish an employee's wages if the agency no longer has any control over those wages. Instead, Section 5520a(b) provides only that "*pay* from an agency to an employee is subject to legal process in the same manner and to the same extent as if the

agency were a private person." 5 U.S.C. 5520a(b) (emphasis added). As the court of appeals correctly determined (Pet. App. 8a), once a federal employee has retired from federal service and has received his or her final paycheck, there is no longer any "pay * * * to an employee" that can be "subject to legal process," no matter how that "process" is defined. For that reason alone, petitioner's claim is without merit.

Petitioner seeks to escape the plain language of Section 5520a(b) by contending that its motion for judgment of recovery was "merely ancillary to * * * the original writ" of attachment and therefore falls within the scope of "'legal process,' as defined in § 5520a." Pet. 7.[4] That argument misses the mark. Even if petitioner's construction of the term "legal process" were correct—and, as the court of appeals explained (Pet. App. 9a-10a), it is not—that construction could benefit petitioner only to the extent that the statutory subject of petitioner's "process," an employee's "pay," is still available. Once an employee has left the federal workforce and no longer receives "pay," however, that statutory subject no longer exists, and Section 5520a(b) provides a judgment creditor in petitioner's position with no cause of action against the federal treasury.[5]

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[4] By contrast, in the court of appeals, petitioner contended that "[t]he proceeding pursuant to the Motion was * * * in essence a tort action, different in kind from the original garnishment action." Petitioner's Supp. C.A. Br. 2; accord Pet. App. 9a-10a.

[5] Petitioner's reliance (Pet. 6) on a regulation of the Office of Personnel Management (OPM), see 5 C.F.R. 582.305(g), is also unavailing. As the court of appeals recognized, that regulation "does not purport to set forth an interpretation of § 5520a(b) and it is, in any event[,] ambiguous." Pet. App. 9a

In any event, the doctrine of sovereign immunity—which the court of appeals did not reach because it found that Congress has provided no cause of action entitling petitioner to the relief it seeks—independently justifies the court's judgment. "[A] waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane* v. *Pena*, 116 S. Ct. 2092, 2096 (1996). Thus, "[t]o sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims." *Id.* at 2096-2097; accord *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33 (1992); *Department of Army* v. *FLRA*, 56 F.3d 273, 277 (D.C. Cir. 1995) ("An Act of Congress is not unambiguous, and thus does not waive immunity, if it will bear any 'plausible' alternative interpretation.") (citing *Nordic Village*, 503 U.S. at 34).[6]

Here, the United States has waived its sovereign immunity only to the extent that a federal agency

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n.1. Moreover, in light of the issues raised in this case, OPM recently issued a formal proposal to amend its regulations to make clear that they do not "support * * * the conclusion that Congress has waived the Federal Government's sovereign immunity in a manner that would make the Federal Government liable for damages as a result of a failure to comply with legal process." Notice of Proposed Rulemaking, Processing Garnishment Orders for Child Support and Alimony and Commercial Garnishment of Federal Employees' Pay, 62 Fed. Reg. 31,763, 31,763 (1997); see also *ibid.* (proposing similar change to regulations relating to garnishment for child-support purposes).

[6] Although it now contends otherwise, see Pet. 10, in the court of appeals, petitioner accurately characterized "[t]he remedy sought in the instant action" as "damages for the government's admitted error." Petitioner's Supp. C.A. Br. 4.

may be required to garnish the wages of an employee currently on the federal payroll, not to the further extent that it must pay creditors an amount in damages equal to what it should have withheld, but did not withhold, from a former employee's salary. That distinction has significant practical consequences for the public fisc. In the former context, the government's obligations are limited to what it has already agreed to pay a federal employee, and the only effect of the garnishment order is to alter the payee of the government's check. See generally *Nationwide Investors* v. *Miller*, 793 F.2d 1044, 1046 (9th Cir. 1986) ("the government has nothing at stake beyond the address of its payroll check"). By contrast, the type of remedy that petitioner seeks would substantially increase the government's obligations, because it would force the government to pay a creditor an amount that it has already paid its former employee. Because Section 5520a(b) does not "unambiguously" subject the federal treasury to such additional obligations, see *Lane*, 116 S. Ct. at 2097, petitioner's construction of that provision would be wrong even if the provision were ambiguous with respect to the issue presented here.[7]

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[7] The petition does not cite, and presents no claim under, the Administrative Procedure Act (APA), 5 U.S.C. 702, nor did petitioner present any such claim in the court of appeals. For that reason, petitioner's reliance (Pet. 10) on cases interpreting the APA's remedial provisions—*Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), and *Aetna Casualty & Surety Co.* v. *United States*, 71 F.3d 475, 479 (2d Cir. 1995)—is misplaced. The petition also presents no claim under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.* See Pet. App. 10a n.2. Finally, despite petitioner's contrary position (see Pet. 8-9), which it did not present to the court of appeals and which

2. Petitioner concedes that "the decision of the Court of Appeals is the only known interpretation of 5 U.S.C. § 5520a." Pet. 4. Petitioner nonetheless contends that this case would be an appropriate vehicle for addressing the meaning of a different statute: 42 U.S.C. 659, which concerns the garnishment of a federal employee's pay to satisfy child-support or alimony obligations, rather than obligations to commercial creditors. See Pet. 4-6, 12. That contention is without merit. First, it is somewhat anomalous for petitioner, a bank, to focus its request for certiorari on a purported need for this Court to interpret a child-support statute that is not at issue in this case and has no obvious bearing on petitioner's commercial interests. Moreover, although 5 U.S.C. 5520a and 42 U.S.C. 659 (Supp. II 1996) contain some similar language, they differ in material respects. For example, the child-support provision provides for garnishment by the federal government of a range of "moneys payable to an individual," see 42 U.S.C. 659(h) (Supp. II 1996), whereas Section 5520a confines commercial-debt garnishment to the more limited category of "pay," 5 U.S.C. 5520a(b). Thus, unlike the commercial-debt statute, see 5 U.S.C. 5520a(a)(2) and (4); see also pp. 2-3, *supra*, the child-support statute allows garnishment of, for example, a former employee's federal retirement benefits, see 42 U.S.C. 659(h)(1)(A) (Supp. II 1996).[8]

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that court did not address, the compensatory relief that petitioner seeks against the federal treasury bears no resemblance to a judicial fine imposed in contempt proceedings.

[8] The petition presents no argument that the government has either the authority or the obligation to garnish Randolph's retirement benefits.

Petitioner also contends (Pet. 5) that the decision below is "at odds with" the Eleventh Circuit's decision in *Loftin* v. *Rush*, 767 F.2d 800 (1985), which addressed the extent to which Congress waived sovereign immunity in enacting the child-support garnishment statute.[9] Even if that statute were sufficiently similar to Section 5520a(b) to make it meaningful to speak of any "conflict" in this context, *Loftin* is entirely consistent with the decision below, as the court of appeals recognized. See Pet. App. 10a-11a & n.3. Unlike the debtor in this case, the federal employee in *Loftin* was still on the federal payroll, and the government therefore still had control over funds that could be garnished. That fact was essential to the reasoning of the *Loftin* court, which emphasized that, in enacting the child-support statute, "Congress determined that the government could act as a collection agent in certain cases, but created no right of action against the government for moneys owed by its employees to third parties." 767 F.2d at 809; see also Pet. App. 11a (noting that, under *Loftin*, 767 F.2d at 809, the government's garnishment obligations under the child-support statute are limited to "'moneys due a federal employee at the time' the government is served with legal process"). Although the Eleventh Circuit ultimately ordered the government to pay the child-support creditor "the money it should have withheld," 767 F.2d at 810, the court of appeals in this case explained that, in *Loftin*, "the government could

[9] Congress recently enacted a variety of amendments (many of them technical) to the child-support garnishment provisions at issue in *Loftin*. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 362(a) and (d); 110 Stat. 2242, 2247. Those amendments do not affect the commercial-debt provisions at issue in this case.

recoup the judgment by making deductions from the [employee's] future Navy paychecks, something that could not be done here because Randolph is no longer employed at the State Department." Pet. App. 11a n.3.

Finally, petitioner claims (Pet. 4-5) that the decision below "directly contradicts" *United States* v. *Morton*, 467 U.S. 822 (1984), which, like *Loftin*, addressed the child-support statute; petitioner relies principally on this Court's statement that "Congress intended the Government to receive the same treatment as a private employer with respect to garnishment orders." *Id.* at 831. Petitioner's claim of an inconsistency with *Morton* is without merit. This Court made the quoted statement in the course of rejecting arguments that Congress had intended to impose a form of liability on the government that would *not* be imposed on a private employer. *Id.* at 832-833. *Morton* has no bearing, however, on whether a creditor may seek relief from the federal treasury when the government fails to comply with a writ of attachment. More generally, "*Morton* does not stand for the proposition that the government is to be treated, in all cases, as if it were a private employer. *Morton* simply upholds the right of the government to be treated *as well as* a private employer." *Loftin*, 767 F.2d at 807.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1997